No. 82-1346

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

MOTION OF AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION FOR LEAVE TO FILE BRIEF AMICI CURIAE, AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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American Farm Bureau Federation and the California Farm Bureau Federation respectfully move this Court for leave to file the accompanying brief amici curiae in support of Petitioners' position in this case.

INTEREST OF AMERICAN FARM BUREAU FEDERATION AND INTEREST OF CALIFORNIA FARM BUREAU FEDERATION

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization organized in 1919 under the "General Not For Profit Corporation Act" of

the State of Illinois with its principal office in Park Ridge, Illinois. AFBF has as its purpose the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. It has member state Farm Bureau organizations in 48 states and in Puerto Rico, representing more than 3 million member families.

The interest of AFBF in this case is to represent and protect the economic interest of Farm Bureau members across this nation who depend upon an adequate, continuous and affordable source of electricity to operate their farms and ranches and who will be adversely impacted by the ruling of the Court of Appeals for the Eleventh Circuit in this matter.

In addition, the AFBF voting delegates from its 48 member state Farm Bureaus and Puerto Rico assembled in annual meeting in Dallas, Texas, January 12, 1983, adopted the following policy:

> We favor federal relicensing of hydro-electric generation facilities in a manner which will protect agriculture's interest in maintaining the availability of lowest cost energy. The entity which constructed and operated the generation facility during the original license period should be given a preference for the license extension. Only in this manner can the most encouragement be given for risk ventures for construction of future hydro-electric facilities.

The California Farm Bureau Federation is a voluntary, nongovernmental, nonprofit California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county Farm Bureaus with a combined membership at the close of its 1982 membership year of over 99,000 families. Over 85% of all commercial farmers in

the State of California are members of the county Farm Bureaus.

California Farm Bureau Federation seeks this Court's permission to express its views in this case because this Court's disposition herein of the question regarding the construction of the Federal Power Act (the "Act"), 16 U.S.C. § 79(a) *et seq.*, and more particularly, section 7(a) of the Act, 16 U.S.C. § 800(a), will profoundly affect the availability of lowest cost energy to agriculture.

SUBSTANCE OF THE BRIEF AMICI CURIAE

The brief amici curiae, herein, discusses the statutory construction of section 7(a) in conjunction with section 15(a) [16 U.S.C. § 800(a) and 16 U.S.C. § 808(a), respectively] of the Federal Power Act [16 U.S.C. § 79(a) *et seq.*].

The brief argues that the plain meaning of the Act does not give States and municipal applicants a licensing preference nor an engendering right to acquire projects from an original private utility licensee at less than market value at the time of relicensing of a private utility project under the Act. Furthermore, this construction of the Act is consistent with and furthers legislative policy and purpose, does not unfairly reallocate a benefit to one segment of this nation's power consumers at considerable loss and expense to another segment, and is not ambiguous. In addition, this Court need not give undue weight and great deference to a construction of the Act by the Federal Energy Regulatory Commission (herein Commission) which was not contemporaneous with the Act's enactment, which was not consistent with its prior construction, and which frustrates the policy Congress sought to implement.

REASONS FOR GRANTING THIS MOTION

California agriculture, and the rural community of which it is a part, in the main, derives its power from privately

owned utility companies. Similarly, nationwide, American agriculture depends upon a continuous and affordable source of electric power, much of which is supplied by private utilities.

Hydroelectric power is the cheapest major source of electrical power production in the United States. The sector of the public which is serviced by privately owned utilities shares the benefits of the cheaper power, to the extent that its utility supplier derives power from the supplier's own hydroelectric plants. In this respect, the Public Utility Commission regulations of various states mandate that rates charged by investor owned utilities be commensurate with actual cost of the power sold, thus making sure that the benefits of cheap production cost pass through to the constituent consumers.

The construction given to the statute in question by the Federal Energy Regulatory Commission and the Court of Appeals has the effect of not only giving the states and/or municipalities preference on relicensure of existing investor owned hydroelectric plants, but of also allowing municipalities to acquire those plants by paying only net cost plus severance damages to the private utility. This amounts to considerably less than "just compensation" or the "fair market value" for these facilities. The consequential impact of shifting the hydroelectric plant low cost energy benefits from one segment of the populace to another segment, without the acquiring segment having to pay the fair market value for the facilities, would work an extreme hardship on the utility customers in the following respect. Loss of a hydroelectric plant would cause an increase in average fuel costs resulting in higher customer rates. Additionally, the private utility would have to develop alternative power sources, at considerable cost to its consumers, particularly since it would not have recouped replacement capital from the transfer of the facility to the acquiring municipality. Then, finally, the utilities' pur-

chase of surplus power from other suppliers, if available, could approximate "avoided cost" or the price to the acquiring company of fuel generated power. Conceivably, at bargain basement prices, a municipality could acquire hydroelectric plants in excess of its consumer needs, market the surplus energy at a profit and thus subsidize its customers' power expense at the expense of other segments of the public. Presumably, this would be at great expense to agriculture and the rural consumer.

The social and economic impact of preferring the municipalities and their predominately urban consumer over the investor owned utilities and their consumers, including agricultural consumers, cannot be overstated. Likewise, one cannot overstate the significance of the role of this Court in deciding the issues presented herein.

WHEREFORE, the American Farm Bureau Federation and the California Farm Bureau Federation respectfully move this Court for leave to file the accompanying brief amici curiae.

Respectfully submitted,

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By

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BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION

American Farm Bureau Federation and California Farm Bureau Federation respectfully submit this brief in support of Petitioners' position.

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

A statement describing the American Farm Bureau Federation and the California Farm Bureau Federation and their interest herein is set forth in the preceding motion requesting leave to file this brief amici curiae. Likewise, a summary of the following arguments is set forth in the preceding motion under the heading "Substance of the Brief Amici Curiae."

ARGUMENT

I

THE CLEAR UNAMBIGUOUS LANGUAGE OF THE STATUTE IS CONTROLLING

In interpreting a statute, the court must look first at the language of the statute itself.[1] If clear and unambiguous, the inquiry regarding interpretation stops as there is nothing to construe.[2] The issue now before the Court is whether the term "new licensee" as used in Section 7(a) of the Federal Power Act,[3] includes within its scope a private power company "original licensee" against whom a state or municipal preference would apply at the time of issuance of a subsequent license to that private company's facility. The pertinent part of Section 7(a) reads as follows " . . . in issuing licenses to new licensees under section 15 of this title, the Commission shall give preference to applications therefor by States and municipalities. . . ."[4]

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[1]United States v. Standard Brewery, 251 U.S. 210, 217 (1920).

[2]United States v. Fisher, No. 2 Cranch, 358, 386 (1864); Lewis v. United States, 92 U.S. 618, 621 (1876); *also see* Browder v. United States, 312 U.S. 335, 338 (1940).

[3]16 U.S.C. § 800(a).

[4]Section 7(a) of the Federal Power Act states in full:

> (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 of this title the Commission shall give preference to applications therefor by States and municipalities, provided, the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

16 U.S.C. § 800(a).

Since the words "new licensees" as used in Section 7(a) are clearly cross-referenced to Section 15 of the Act, one must turn to that section for illumination of the meaning and use of the words. Section 15 points out that the Commission is authorized *at the time of expiration* of the original license to issue a "new license" to the "original licensee" or to issue a "new license" to a "new licensee."[5] At the time in question, namely the expiration of an original license, Section 15 clearly distinguishe. between issuing a new license to the original licensee and issuing a new license to a new licensee. The terms set forth two classes of applicants in contradistinction to each other, and in no way does the term "new licensee" as used in this section include the "original licensee."

Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the

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[5]Section 15(a) of the Federal Power Act, (16 U.S.C. § 808(a)) states as follows:

> (a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 of this title, the commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a *new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 14 of this title: Provided, that in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. (Emphasis added.)

same sense throughout, and where its meaning is clear, this meaning will be attached to it elsewhere.[6] It follows, then, that the terms "new licensee" as used in Sections 15(a) and 7(a) have the same meaning and sense and that the term "new licensee" in Section 7(a) does not include an original licensee within the class against whom a preference applies. At this point it becomes, as the Court said in *Boudinot v. United States (Cherokee Tobacco)*[7], "the duty of the courts to execute the statute (cites omitted). Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure but cannot enlighten."[8]

II

ASSUMING ARGUENDO, THAT THE TERM "NEW LICENSEE" IS AMBIGUOUS, THEN THE CONSTRUCTION SET FORTH, SUPRA, THAT THERE IS NO PREFERENCE TO A STATE OR MUNICIPAL APPLICANT AT THE TIME OF EXPIRATION OF AN ORIGINAL LICENSE AS AGAINST A PRIVATE UTILITY, IS CONSISTENT WITH AND FURTHERS THE LEGISLATIVE PURPOSE AND POLICY

In 1920 when the legislation was enacted, the major problem the legislature was trying to remedy was the urgent need to tap the availability of hydroelectric power for the economic benefit of the entire public. The "means" available to utilize this natural resource were either direct government development with its concomittant expenditures of taxpayer dollars, or government regulated private

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[6]*See* Gonzales v. Barber, (9th Cir.,) 207 F.2d 398, 402 (1953), *affirmed* 347 U.S. 637; United States v. Montgomery Ward & Company, (7th Cir.,) 150 F.2d 369, 376, 377 (1945), *vacated on other grounds* 326 U.S. 690.

[7]Boudinot v. United States (Cherokee Tobacco), 11 Wall 616; 78 U.S. 227 (1870).

[8]*Id. at* 620, 78 U.S. at 229.

development through the investment and expenditure of private capital. The need and the alternative remedies were clearly set forth in Senate Report No. 180, 66th Congress, 1st Session, in 1919 wherein it states that:

> Every year that our water powers are underdeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good services and cheap power, or the Government itself should proceed to make this development. This bill proceeds on the theory of private development with ultimate public ownership possible.

The need for cheap energy in this country was not satiated by the initial construction, some fifty years ago, of hydroelectric power plants by the private sector. Such a need continues, as does the need for private development of additional energy production capacity. Indeed, the capital requirements associated with the ever expanding need for power in this country, coupled with the more highly sensitive integration problems facing power production in terms of pollution and other ecology concerns, flood control, recreation, and industrial water needs in this expanded society necessitate even larger proportionate costs for the development of hydroelectric power facilities. As is evidenced in the case of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-72 (1978), the ultimate product of the Act reflects the countervailing means and purposes that the members of Congress sought to achieve. The

language in the Act was clearly the result of compromise, and it is the task of this Court to give effect to the statute as enacted.[9]

The Act when viewed as a whole demonstrates the compromise of the above stated competing objectives and "means" as follows:

A. Provisions under the Act which provide for possible governmenal development of hydroelectric facilities or for governmental regulation of the facilities include:

1. A preference for states and municipalities for initial development in all cases where no preliminary permit has been issued previously (Section 7(a)).

2. A preference for states and municipalities on relicensing against all applicants except the original licensee (Sections 7(a) and 15(a) and Argument I, *supra*).

3. The right of the United States to recapture any of the projects upon expiration of the original license issued to a private company (Section 14(a)).[10]

4. The right of the United States or any state or municipality to take over any project licensed under the Act by the process of condemnation upon payment of just compensation (Section 14(a)).

5. The Commission's power to issue licenses only to those applicants who have developed plans that best serve the public interest as determined by the Commission. (Section 7(a), *also see* Section 10(a) and (b), 16 U.S.C. § 803(a) and (b) and Section 11, 16 U.S.C. § 804.)

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[9]*Also see* United States v. Sisson, 399 U.S. 267, 297-298 (1970); Boys Market v. Retail Clerks Union, 398 U.S. 235, 250-253 (1970).

[10]*See* note 11 *infra* for text of Section 14(a), 16 U.S.C. 807(a).

B. The provisions of the Act which encourage and promote the investment in and development of power resources by private enterprise includes:

1. No municipal preference to apply against a private company where a preliminary permit has been issued (Section 7(a)).

2. Protection against Commission alteration of the license during the license term and protection against any adverse changes in the Act during the license term (Section 6, 16 U.S.C. 799, and Section 28, 16 U.S.C. 822.)

3. No municipal preference to apply against an original private company licensee on application for a new license after expiration of an existing license (Section 7(a) and 15(a) and Argument I, *supra*).

As is readily apparent from reading the provisions of the Act, the legislature has reserved to the states the power of condemnation. If therefore, under the Act, a state or authorized municipality may at any time condemn and take over a hydroelectric plant licensed under the Act, what is the true significance behind a construction of the sections in question that would give a municipal preference on relicensing of a private utility plant? The bottom line in this case is dollars. Rather than having to pay "just compensation" for the facilities, a municipality could take over a private facility and with the rights engendered to it under Section 14(a) through Section 15(a) the municipality would need only pay the "net value plus severance damages."[11] It is understood that this latter value could

[11]Section 14(a) provides in pertinent part as follows:

. . . the United States shall have the right upon or after the expiration of any license to take over . . . any project . . . upon the condition that before taking possession it *shall pay the net investment* of the licensee in the project or projects taken, not to exceed the fair value of the property taken, *plus such reasonable damages*, if any, to property of the licensee valuable,

conceivably be little or nothing. A construction which allows a municipal preference at the time of relicensing of a private utility, in tandem, also allows for a forfeiture on the part of private enterprise of its capital investment without receiving just compensation. The best construction of the Act is one which avoids a forfeiture.[12]

In this respect, a private company must virtually give away its capital investment. The results are that it has no means except through higher prices passed through to the consumer to purchase replacement power generation facilities or the private company would have to obtain additional debt and equity financing for the new acquisition or development. The consumers served by the private utility would have to pay the costs of the debt interest and equity earnings in the form of increased power rates set by state Public Utilities Commissions. All this, in addition to the immediate increase in average fuel cost due to loss of a facility which uses no fuel. Conceivably, for every one dollar in market value lost to a municipality which does

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serviceable, and dependent as above set forth but not taken, *as may be caused by the severance therefrom of property taken*, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. *Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.* (Emphasis added.) 16 U.S.C. § 807(a).

[12]Farmers' & M. National Bank v. Dearing, 91 U.S. 29, 35 (1875).

not pay "just compensation," the private company and its constituent consumers would have to pay several dollars in replacement dollars in the form of higher electric rates. This occasions an even larger loss to the private company's consumers, specifically including major segments of American agriculture.

It is clear that private enterprise would not be willing to invest large sums of capital in the development of hydroelectric power where that capital would be subject to future forfeiture. An interpretation of the Act which allows for such forfeiture, clearly thwarts the objective of stimulating private enterprise to assist in the development of hydroelectric power facilities. On the other hand, the fact that the legislature expressly reserves to municipalities and states the powers of condemnation and eminent domain is consistent with the stated policy of "private development with ultimate public ownership possible." When reading the Act as a whole, the condemnation provision coupled with the non-preference construction urged heretofore, provides for a workable integration of the competing methods of achieving hydroelectric power development in this country.

Contrarywise, the construction urged by the Federal Energy Regulatory Commission's opinion defeats the goals of the legislature by allowing States and municipalities to take over existing plants pursuant to a preference upon relicensure. It is entirely possible that the states and municipalities will satiate their power needs through this acquisition process, thus reducing any desire or need for them to invest or develop additional hydroelectric facilities and, in the meantime, private enterprise is going to be extremely reluctant to invest capital which is subject to future forfeiture and loss. Indeed, rather than developing hydroelectric facilities, private enterprise would tend to invest in other types of energy producing plants, all at a greater cost to the consumer.

As to the risk of future forfeiture and loss, it should be noted that the potential risk of loss by private companies to one entity, namely the United States Government (as entailed in Section 14's allowance for take over by the United States with specific Congressional authorization), is entirely different in scope and inevitability as compared to the scope of the risk of loss by the private company to a stampede of various state municipalities all trying to grab the merchandise at a bargain basement sale.

Where Congress seeks to promote dual objectives in a single statute, courts must be most hesitant to infer from its silence a cause of action that while serving one legislative purpose will disserve the other.[13] A construction which omits "original licensee" from inclusion in the term "new licensee" as it relates to the municipal preference in Section 7(a) preserves the two-fold method of achieving hydroelectric power production and development. It serves to stimulate continuing private enterprise development, provides for the "possibility of public ownership" through condemnation or through competition on the merits with an original licensee, and provides for additional resource development by the public entities. In addition, the conditional licensing feature of the Act continues to provide for public policy implementation in the broadest sense, by providing for new terms and conditions upon the issuance of new licenses. It further provides a means for both updating the systems and expanding the facilities' interface with the environment in such a way as to meet the needs of the public.

On the other hand, what the Federal Energy Regulatory Commission is asking "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that

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[13]Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978); United States v. Sisson, 339 U.S. 267, 298 (1970); *Also see* Kokoszka v. Belford, 417 U.S. 642, 646, 650-651 (1974).

what was omitted, presumably by inadvertence, may be included within its scope."[14] The legislature did not include the original licensees in the class of new licensees against whom a municipal preference applies. This Court should not enlarge the Act by including what was omitted.

Finally, the plain meaning of the Act as set forth, *supra*, implements completely the duality of "means" utilized by the legislature to achieve hydroelectric power development, and at the same time, (a) maintains stability in the current economic situation of the public relying upon privately produced power, (b) maintains a system of distribution of the benefits of cheap energy which is regulated and passed through to public consumers, (c) avoids a forfeiture so long as private companies are willing to meet the expanded needs and conditions for a relicensing, (d) allows for municipalities to take over hydroelectric facilities through just compensation condemnation proceedings, (e) continues to provide incentives for future development of cheap hydroelectric power through the use of private capital as well as public capital, and (f) honors the reliance factor of private utilities who invested funds with a plain meaning construction of the Act in mind as hereinabove urged upon this Court. It is clear that the construction of the term "new licensees" to exclude "original licensees" is consistent with the objectives and policy of the laws indicated by the various provisions of the Act, and will have the effect of carrying into execution the will of the legislature.[15]

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[14]Iselin v. United States, 270 U.S. 245, 251 (1926).

[15]Kokoszka v. Belford, 417 U.S. 642, 650 (1974).

III

THE ADMINISTRATIVE INTERPRETATION OF A STATUTE WHICH IS NEWLY MADE, NOT LONG-STANDING, NOR CONTEMPORANEOUS WITH THE ENACTMENT, AND NOT CONSISTENT WITH PRIOR INTERPRETATIONS IS NOT TO BE GIVEN ANY OFFICIAL WEIGHT BY THE COURT

In the case of *Walling v. Swift & Company,* (7th Cir.) 131 F.2d 249, at 252 (1942), the Court held that an administrative decision which is newly made and challenged at the earliest opportunity is not to be given any special weight by the courts in their construction of the statute. Furthermore, administrative agency rulings, interpretations, and opinions are not controlling upon the courts by reason of their authority, but rather constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance, with their weight being dependent in a particular case upon the thoroughness evident in the agency's consideration, the validity of the agency's reasoning and its consistency with earlier pronouncements.[16] Indeed, the courts are the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that are inconsistent with the statutory mandate or that frustrate the congressional policy.[17] The amount of deference to be given an administrative agency's interpretation of a statute varies in degrees commensurate with such factors as the timing and

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[16]General Electric Company v. Gilbert, 429 U.S. 125, 141-142 (1976); Skidmore v. Swift & Company, 323 U.S. 134, 140 (1944); *also see* United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 665, 674 (1973).

[17]Securities and Exchange Com. v. Sloan, 436 U.S. 103, 118 (1970); Federal Maritime Comm. v. Seatrain Lines, Inc., 411 U.S. 726, 745-746 (1973).

consistency of the agency's position.[18] In this vein, an administrative interpretation of a statute which has not been uniform, is not entitled to the respect and weight accorded to a uniform construction.[19]

Finally, while an agency's interpretation of the statute under which it operates is entitled to some deference, this deference is constrained by the United States Supreme Court's obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.[20]

In the case at bar, the interpretation of the Act by the Federal Energy Regulatory Commission is newly made and was challenged at the earliest opportunity and therefore is not to be given any special weight by the courts in their construction of the Act.[21] The construction of the Act given by the Commission in June of 1980, some sixty years after the enactment of the legislation, can hardly be said to be contemporaneous. Furthermore, in 1968, at the time that Section 7 and Section 15 of the Act were amended, the Commission in its report to Congress offered a reverse interpretation of the preference when it stated:

> Under section 7(a) of the Federal Power Act, the Commission is instructed to give preference to applications by States and municipalities in issuing licenses to new licensees under section 15. Our General Counsel has advised us that this preference applies only after it has been determined that the original licensee should not receive a new license. In those instances where

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[18]Batterson v. Francis, 432 U.S. 416, 425 n. 9 *and cases cited thereunder* (1977).

[19]United States v. Missouri P. R. Co., 278 U.S. 269, 280 (1928); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1931).

[20]Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979).

[21]Walling v. Swift & Company, (7th Cir.) 131 F.2d 249, 252 (1942).

> the original licensee and another applicant seek a new license for the same project, the Commission believes that the new license is to be issued to whichever applicant can best meet the standards of the act. In those rare cases where the two applicants are equally matched, the Commission believes that the new license should be issued to the original licensee so long as he can meet the standards of the act at least as well as the other applicant. (House Report Number 1643, 90th Cong. (1968).)

Accordingly, there simply has not been the consistency required to give deference to the current administrative interpretation of Section 7(a) and 15(a) of the Act. It appears that the Court of Appeals gave the Commission's interpretation deference as a substitute for the Court exercising its obligation as the final authority on the issues presented. In this sense, the Court of Appeals decision amounted to a mere rubber-stamp of the administrative decision.[22]

Finally, even assuming arguendo, that there was some deference that could be afforded the recent decision by the Commission, this deference is constrained by the United States Supreme Court's obligation to honor the clear meaning of the Act as revealed by its language, purpose and history.[23] The clear meaning of the Act has been set forth, *supra*, in Arguments I and II. Accordingly, the construction given the Act in the Court below must be reversed.

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[22]Cases cited note 17 *supra*.

[23]Case cited note 20 *supra*.

CONCLUSION

In the case at bar the Federal Energy Regulatory Commission and the Court of Appeals incorrectly construed the statutes in question in such a way as to (a) do violence to the plain meaning of the words used in the Act, (b) thwart the policy and purpose of the legislature, (c) destroy the compromise and shift the balance between competing policies in the Act as struck by the legislature in its enactment, in the process promoting forfeitures and threatening great expense and injustice to the public sector served by private utilities. Additionally, the Court of Appeals incorrectly gave undue weight to a noncontemporaneous, nonconsistent, administrative interpretion of the Act.

WHEREFORE, amici curiae, American Farm Bureau Federation and California Farm Bureau Federation respectfully pray that this Court grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

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